



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: )  
)  
) ISCR Case No. 11-10146  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Christopher Morin, Esq., Department Counsel

For Applicant: Christopher Graham, Esq.

07/31/2013

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concerns raised under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is granted.

**Statement of the Case**

On February 8, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) citing security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) of the Adjudicative Guidelines (AG).<sup>1</sup> In his Answer to the SOR, Applicant admitted the allegation under Guideline H, but

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<sup>1</sup> Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

denied the allegation under Guideline E. He also requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on June 14, 2013, and I convened the hearing as scheduled on July 10, 2013. I admitted two Government exhibits (GE 1-2), and two exhibits offered by the Applicant (AE A-B). DOHA received the transcript on July 17, 2013.

### **Findings of Fact**

Applicant's admission to the drug involvement allegation is incorporated as a finding of fact. After a thorough review of the pleadings and the record evidence, I make the following additional findings of fact.

Applicant is 42 years old. He married in 2004, and has two children three and seven years of age. He received a bachelor's degree in economics and information systems in 2001. He has worked in the information systems field since the late 1990s. In November 2010, he accepted his current position with a federal contractor. He applied for a security clearance in December 2002 and was granted a secret clearance in March 2003. In 2011, he submitted his current application, to upgrade his clearance to top secret. (GE 1; Tr. 16-23, 28)

Applicant disclosed in his 2011 security clearance application that he used marijuana about two times between January 2003 and January 2004. He testified that he was unsure of the dates. He entered "Estimated" on the security clearance application, and entered dates that he thought were correct. He knows the drug use occurred before he was married. He has not used marijuana since his marriage in 2004. He has not used any illegal drugs other than marijuana. Applicant testified, (GE 1; Tr. 23-25, 29, 51)

I regretted it -- I still regret it to this day. You know, when I did that at that time, things were -- you know, I was a different person. I wasn't married. I -- I didn't have any children. You know, when you get married and you have children, your life changes a lot and my life has changed a lot over the last ten years and --

Applicant's first instance of marijuana use noted in his application occurred when he used it while at a party with friends. He accepted a joint that was passed to him by a friend. He is unsure if he had been granted a security clearance at the point in time when he used marijuana on this occasion, but knows it was around the same time. His second use was a few months later at another party with friends. He again took a puff or two from a joint that a friend passed to him. He was intoxicated in both instances when he accepted the marijuana joints. He testified he does not know if the company where he worked at the time had a substance abuse policy, but he was not required to take a urinalysis before being hired, and was not subject to random drug tests while he worked there. He testified that he no longer associates with the friends with whom he used marijuana. (GE 2; Tr. 23, 36-42)

The SOR alleges that Applicant used marijuana after being granted a security clearance in March 2003.<sup>2</sup> When he completed his 2011 security clearance application, he answered “No” when asked if he had ever used an illegal drug while possessing a security clearance. On the same application, he listed June 2004 as the date his first security clearance was granted, and estimated his marijuana use occurred between January 2003 and January 2004. However, in his Answer to SOR allegation 1.a, which notes that his security clearance was granted in March 2003, Applicant stated that his marijuana use occurred while he held a security clearance. During his hearing testimony, Applicant testified that he was uncertain about the exact dates he used marijuana. (GE 1; Tr. 29-32, 50)

Applicant has not received medical treatment or counseling for drug abuse. He submitted a Statement of Intent, signed on June 24, 2013, stating that he will not use any illegal drug in the future, and agreeing that such use would constitute grounds for automatic revocation of any security clearance he held at that time. (GE 2; AE A)

Applicant submitted a character reference letter from the director of technical operations at his current company. He was Applicant's direct supervisor for more than two years. He describes Applicant as diligent, hard-working, and reliable. He also stated that Applicant is a “family man” who has been married for almost ten years and enjoys family activities. He attests to Applicant's “good character.” Applicant is involved with his daughter’s school, sports, and scouting activities. (AE B; Tr. 25-27)

### **Policies**

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.<sup>3</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline H (drug involvement) and Guideline E (personal conduct).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest<sup>4</sup> for an applicant to either receive or

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<sup>2</sup> Evidence showing the date the security clearance was granted was not offered.

<sup>3</sup> Directive. 6.3.

<sup>4</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.<sup>5</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as her or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.<sup>6</sup>

## Analysis

### Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern about drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Of the disqualifying conditions listed at AG ¶ 25, the following apply:

- (a) any drug abuse; and
- (g) any illegal drug use after being granted a security clearance.

Applicant admits to using marijuana twice between 2003 and 2004. Applicant was granted a secret security clearance in 2003. His illegal drug use occurred while he held that security clearance. There is no record evidence that Applicant bought, sold, or cultivated marijuana, that he was diagnosed by a medical professional with drug abuse, or advised to attend a drug treatment program. AG ¶¶ 25(a) and (g) apply.

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<sup>5</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>6</sup> See *Egan*; AG ¶ 2(b).

The following mitigating conditions are relevant under AG ¶ 26:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's use of marijuana occurred approximately ten years ago, and his two uses at that time were infrequent. He used it when a friend passed him a joint at a party. He no longer associates with the friends with whom he used marijuana. His life has changed: he is no longer single, has been married almost ten years, and has two children. Given Applicant's 10 years' of abstinence, and the changed circumstances in his life, it is unlikely that the conduct will recur. Applicant's behavior of ten years ago does not cast doubt on his current trustworthiness and reliability. AG ¶ 26(a) applies.

Mitigation is also available under AG ¶ 26(b). I find Applicant's testimony credible that he has no intent to use marijuana in the future, based on his decade of abstention, his lack of contact with drug-using friends, and his notarized statement that he will not use marijuana and other illegal drugs in the future.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern about personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance

process or any other failure to cooperate with the security clearance process.

The following disqualifying condition is relevant under AG ¶ 16:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior . . . .

Applicant engaged in untrustworthy and unreliable behavior when he used marijuana at parties in 2003. He admits that he demonstrated poor judgment. AG ¶ 16 (d)(1) applies.

The following mitigating condition under AG ¶ 17 is relevant:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant's offense violated the law, and so it was certainly not minor. However, his two instances of using marijuana constitute infrequent use. In addition, a significant amount of time has passed since Applicant engaged in this conduct. He credibly testified that he regrets the poor judgment he displayed at the time. His life has changed considerably in the past decade, and it is unlikely he will engage in such conduct again. His current trustworthiness and reliability are not in doubt. AG ¶ 17(c) applies.

### **Whole-Person Analysis**

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant used an illegal drug two times, a decade ago. He was ten years younger, and single. His admission that he used poor judgment in becoming intoxicated and then using marijuana shows rehabilitation. In the ten years since then, he has become a husband and father. He has been married for almost ten years. He performs well in a responsible position. He does not associate with the friends with whom he used marijuana. There is no record evidence of similar conduct or poor judgment since. He spends his time with his wife and children. He signed a statement of his intent to avoid illegal drugs in the future, and realizes such conduct would result in the loss of any security clearance he might hold at that time.

A fair and commonsense assessment of the available information shows Applicant has satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has mitigated the security concerns arising from the cited adjudicative guidelines.

### **Formal Findings**

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

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RITA C. O'BRIEN  
Administrative Judge